INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	3
Argument	9
I. There is no conflict of decision	12
Conclusions	15

Cases Cited.

Burns v. United Brotherhood of Carpenters and Painters of America, 204 F. S. 599 (U. S. D. C. Del. 1962) 11, 15

Bussey v. Plumbers, Local No. 3, 286 F. 2d 165 (C. A. 9, 1961) 15

International Association of Machinists v. Gonzales, 356 U. S. 617 (1958) 9, 10, 12, 13, 14, 15

Iron Workers, Local 207 v. Perko, 373 U. S. 701 (1963) 9, 12, 13

NLRB v. Allis-Chalmers Mfg. Co., 65 L. R. R. M. 2449, 35 L. W. 4623 (June 12, 1967) 10, 13

Plumbers Local 100 v. Borden, 373 U. S. 690 (1963) 9, 12, 13

Sipes v. Vaca, 397 S. W. 2d 658 (1966) 13

Vaca v. Sipes, 386 U. S. 171 (1967) 13

Statutes Cited.

Labor Management Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. A. 141 et seq.) 2
Labor Management Relations Act, Section 8 (b) (2).. 10
L. M. R. A., Section 8 (b) (1) (A) (61 Stat. 136, 73 Stat. 519, 29 U. S. C. A. 158 (b) (1) (A) 10
29 U. S. C. A. 411, 73 Stat. 522 11
29 U. S. C. A. 413, 73 Stat. 523 11

Texts Cited.

Chafee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1930) 9
Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951) 9
Summers, The Law of Union Discipline; What Courts Do in Fact, 70 Yale L. Rev. 175 (1960) 9

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 245.

CHARLES W. GROGAN, et al.,
Petitioners,

v.

ANTHONY J. WACHTER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri.

BRIEF OF RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the St. Louis Court of Appeals (App. A of the Petition) is reported at 410 S. W. 2d 550. The Supreme Court in Missouri is denying Petitioners' application for transfer did not write an opinion.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Whether an action for damages sustained by a person between the date of his wrongful expulsion from Union membership to the date that the International decided his appeal and ordered him reinstated to Union membership is an "internal union matter" over which the state courts have jurisdiction.

STATUTES INVOLVED.

The pertinent portions of the Labor Management Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. A. 141 et seq.) are set forth in Appendix B of the Petition.

STATEMENT.

Respondent, Anthony J. Wachter, became a member of Local Union No. 600 on January 28, 1946, the day he was first employed by C. E. S. Truck Lines as a truck driver (156).

Respondent attended about every Union meeting (154, 304, 367). In 1953 or 1954, he was elected a shop steward by his fellow employees at C. E. S. Truck Lines and represented them in meetings with that Company (155-156). He participated in Union elections and in 1955 supported a slate of candidates for union office that was defeated (157-158).

At a regular Union meeting on May 15 or 16, 1955, a by-law change was proposed so that shop stewards would be appointed by the Union president rather than elected by employees of the Company involved (191-192). Charles W. Grogan, the Union president, was in favor of the proposed by-law which was defeated (193-195).

After that meeting respondent heard Grogan say what is wrong with the president selecting stewards from a terminal because we have "nothing but god-dam bums like Tony Wachter who is down at C. E. S. and it would be better to get rid of them kind of people " (161, 195).

On the following day, Wachter telephoned Grogan and accused him of calling him a bum. The latter denied making the statement and both parties agreed to forget the matter (162, 350-351).

On August 9, 1955, respondent was discharged by C. E. S. Truck Lines (292-293, 213).

The matter of respondent's discharge was taken to a grievance hearing (295-296). It was heard by a six-man committee—three from management and three from

labor. One of the labor representatives was Charles W. Grogan (339-342). During the course of that hearing, respondent was asked if he had anything to add and he blew up and said, "I know I am being kangarooed" (343, 226-227). The grievance committee unanimously upheld his discharge (313).

After his discharge, respondent had difficulty in finding steady work. As a result on August 20, 1955, he wrote a letter to Harold Gibbons, President of Joint Council 13, in which he was critical of the handling of the grievance. When Gibbons did not answer promptly, respondent on August 29, 1955, wrote Dave Beck, General President of the Union (Ex. T), and enclosed a copy of his letter to Gibbons. Thereafter, on September 23, 1955, Gibbons wrote Grogan for the facts (Ex. T.). On September 26, 1955, Grogan replied to Gibbons' letter (Ex. U.)

Wachter filed charges against Grogan with the Union. They were heard on October 8, 1955. These charges were based on Article 18, Section 6, Subsections 8 and 12 of the Union Constitution which relate to abuse of fellow members by written or oral communication and other acts or conduct inconsistent with the duties, obligations and fealty of the trade union movement and violation of sound trade union principles (34-37).

The Executive Board of Local 600 found Grogan not guilty of the charges respondent filed against him. It did not find that respondent had not brought his charges in good faith or that he was actuated by malice (Ex. F, 140-141).

Thereafter on October 25, 1955, Grogan filed charges against respondent on Local 600 stationery and signed them as president of the Union. Those charges alleged (1) violation of Section 2 of Article 18 of the Union constitution in that he had preferred charges that were not

sustained which were not brought in good faith and that plaintiff was actuated by malice; (2) gross disloyalty and conduct unbecoming a member; (3) abuse of a fellow member and officer of his Union by oral communication; (4) activity which tends to bring the Local and International Union into disrepute; (5) disobedience to the regulations, rules, mandates and decrees of the Local Union; (6) other acts and conduct which are inconsistent with the duties, obligations, and fealty of the trade union movement and for violation of sound trade union principles (Ex. L, 101-102, 357-358).

Respondent's trial was held on November 19, 1955 (102).

Charles Grogan at the hearing testified that he was going to attempt to prove respondent guilty on all counts by his filing charges against me, the remarks he made about his discharge, and the way his discharge was handled "it was a result of a disgruntled member and it was through malice" (108-109).

On February 16, 1956 the Local Executive Board found Wachter guilty of all charges filed by Grogan and ordered him permanently expelled from the Union (Ex. G, 141-143).

Respondent appealed to Joint Council 13 which upheld his expulsion (169). He then appealed to the International Union which on July 2, 1958 ordered him reinstated "with any and all rights and privileges retroactive to the date of his expulsion" (170-171).

At all times the Union Constitution provided:

> "If charges are preferred and such charges are not sustained, and the trial or appellate body is convinced that the same were not brought in good faith or were actuated by malice, the trial body or the

appellate body may impose such penalty by the way of punishment as in its judgment is deemed proper under the circumstances" (Union Const. Art. XVIII, Sec. 11, Ex's. H and I, 152-153).

It further provided:

"* * * If the member charged or preferring the charges is a member of such Board the President of the Union shall appoint a disinterested member as a substitute" (4, 146).

Three business agents of Local 600 were appointed by the Vice President of the Union to sit as members of the Executive Board which tried Wachter and Grogan. In each trial, two of the three business agents sat as members of the panel (275-276, 310). Each of these individuals had been appointed to his job by Grogan, served at his pleasure and could be removed by him (145).

According to Grogan, the fact that Wachter filed charges against him is not the only reason he filed charges against respondent. It was his general behavior, remarks he made about the Union and the way his case was handled. These remarks were made to Grogan and he did not know if respondent had made them to anyone else (358-360).

Grogan said he believed that Wachter had a right to express his opinion on his discharge but that he was attempting to ridicule the Union in the way he was represented at the grievance hearing (383). He did not consider respondent a strong Union man because he always wanted his way, and his feelings were too strong (368).

After his discharge by C. E. S. Truck Lines, respondent looked for work and found employment through "different people, you might say a grapevine that had information of jobs"—other drivers and dockmen (174). None

of these jobs were steady (180-181). In December, 1955, respondent was operated on for a hernia and was unable to work for eight weeks (263-265). By the time he was able to return to work he had been expelled by the Union (174). After his expulsion, respondent continued to look for work. He worked three weeks for one employer and seven or eight days for another (174-175). Thereafter, he worked in a tavern which he had owned with his father-in-law (181). After his reinstatement to Union membership, he returned to work in the trucking industry (181, 153, 177).

Respondent did not endeavor to introduce any evidence and there is no evidence in the record that the Union told any employer not to hire Wachter. In fact, the only evidence in the record is to the effect that the Union never told anyone not to hire respondent and that it did not interfere with his employment (318-319).

Respondent's wife, Laverne, testified that after respondent received the letter of expulsion his life changed; that you could hardly live with him; that all he did was worry and that he didn't talk or take an interest in the children like he had done previously (278-280).

Respondent's expulsion from Union membership lasted for slightly more than two years and four months—February 16, 1956 (Ex. G) to July 2, 1958 (170-171). During all of that time he pursued his internal union remedies in order to vindicate his wrongful expulsion.

After being reinstated to membership in the Union, respondent brought this action to recover damages for his wrongful expulsion (2). He alleged that his trial was in violation of the Union Constitution (9-11); that Union membership is a valuable right (6); that as a result of the action of Local Union 600 in expelling him from Union membership he was unable to obtain steady employment;

that he suffered severe mental pain and anguish and that the actions of the Local Union No. 600 were wilful and malicious for which he sought punitive damages (11-12). Nowhere in his petition did he allege that the Union had caused any employers to either refuse to hire him or to discharge him.

The jury awarded respondent $12,700.00 actual damages and found for the Union on the issue of punitive damages (410).

ARGUMENT.

Petitioners endeavor to obtain certiorari by assuming that the matters involved in this case are "arguably" an unfair labor practice and by further asserting that the state court did not have jurisdiction because respondent did not seek restoration of union membership. They argue that **International Association of Machinists v. Gonzales,** 356 U. S. 617 (1958) is distinguishable and that the holding of the St. Louis Court of Appeals is in direct conflict with the decision of this court in **Plumbers Local 100 v. Borden,** 373 U. S. 690 (1963), and **Iron Workers, Local 207 v. Perko,** 373 U. S. 701 (1963). According to petitioners, the case at bar and **Borden** and **Perko** focus directly with matters of employment, and **Gonzales** involves internal union matters (Petition pages 11 and 12).

The fallacy with this argument is that respondent was seeking damages for wrongful expulsion from union membership for a two year four month period because the union had breached its contract with him by wrongfully expelling him in complete and total disregard of established union procedures and because the expulsion proceedings were instituted in bad faith. Cf. **Chafee, The Internal Affairs of Associations Not for Profit,** 43 Harv. L. Rev. 993 (1930); **Summers, Legal Limitations on Union Discipline,** 64 Harv. L. Rev. 1049 (1951); and **Summers, The Law of Union Discipline; What the Courts Do in Fact,** 70 Yale L. Rev. 175 (1960).

Accordingly, this case is concerned with internal union affairs. It is not concerned with and does not deal directly with matters of employment.

To make **Borden** and **Perko** applicable, petitioners have to show that the matters complained of are "arguably" an unfair labor practice. This they have failed to do.

In their petition they quote two sections of the Labor Management Relations Act (Petition page 12) as constituting possible unfair labor practices.

One of these sections makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of rights guaranteed in Section 7, provided that this provision shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein, L. M. R. A., Section 8 (b) (1) (A) (61 Stat. 136, 73 Stat. 519, 29 U. S. C. A. 158 (b) (1) (A)). In **NLRB v. Allis-Chalmers Mfg. Co.**, 65 L. R. R. M. 2449, 35 L. W. 4623 (June 12, 1967) this court held that it was not an unfair labor practice in violation of this section for a union to levy fines on members, who crossed a picket line during a strike. In that case this court did not question the union's power to expell from membership. This was assumed. Rather, the issue was whether a fine constitutes an unfair labor practice, and this court held that it did not because the act did not deal with the internal affairs of unions.

In **Allis-Chalmers** the court recognized that the provision in a union constitution defining punishable conduct and the procedures for trial and appeal constituted part of the contract between the members and the union, and that the court's duty is to enforce the contract. Cf. **International Association of Machinists v. Gonzales**, 356 U. S. 617 (1958).

Petitioners also endeavor to assert that this matter was arguably an unfair labor practice under Section 8 (b) (2) of the Labor Management Relations Act in that respondent claimed that employers refused to hire him because of his lack of union membership and because the union encouraged employers to deny him employment. The fallacy with such assertions is that they are not supported by the record in this case.

Respondent never claimed that any employers refused to hire him because he was not a member of the union or that the union encouraged employers not to hire him.

In his petitions he alleged that union membership is a valuable right (6) and that it is valuable in obtaining steady employment (7). He did not claim that the union caused anyone to discriminate against him because he was not a member of the union nor did he introduce any evidence to this effect. In fact, the only evidence on this score was the testimony of the union witness, Robert Capps, who said that he never told anyone not to hire respondent and that to his knowledge none of the officers of Local 600 endeavored to interfere with respondent's employment (319).

If an employer discriminated against respondent because of his expulsion, and there is no claim that this happened, without being induced to do so by the union, the jurisdiction of this court is not preempted by a possible unfair labor practice committed by an unknown third person. Cf. **Burns v. United Brotherhood of Carpenters and Painters of America**, 204 F. S. 599 (U. S. D. C. Del. 1962).

Since an unfair labor practice is not even arguably involved, the doctrine of preemption cannot come into play.

Furthermore, this case arose between 1956 and 1958. At that time the Landrum-Griffin Amendment to the Labor Management Relations Act had not been passed. In fact, cases like respondent's led to passage of the Bill of Rights of union members contained in that Act, which restricts exhaustion of internal union remedies to four months (73 Stat. 522, 29 U. S. C. A. 411), and which does not "limit rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal" (73 Stat. 523, 29 U. S. C. A. 413).

In the future cases which involve preemption will involve consideration of that Act. Review by certiorari of the instant case would not be a decision that would aid in shaping future labor policy.

I.

There Is No Conflict of Decision.

Petitioners' assertion that the case at bar conflicts with the decisions of this court in **Plumbers, Local 100 v. Borden,** 373 U. S. 690 (1963); and **Iron Workers, Local 207 v. Perko,** 373 U. S. 701 (1963); and that **International Association of Machinists v. Gonzales,** 356 U. S. 617 (1958), is distinguishable, is totally without merit.

In **Gonzales,** supra, plaintiff sought reinstatement to union membership and damages for inability to find work, mental pain and suffering, and punitive damages. In holding that the doctrine of preemption was not applicable, the court pointed out that protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law; that the assertion of any such power had been expressly denied by Congress and that the controversy was one that gives legal efficacy under state law to the rules prescribed by a labor organization for retention of membership therein.

Borden, supra, was a damage suit by a union member, who had not been expelled, based on the union's refusal to refer him for employment notwithstanding union clearance and acceptance by an employer. He asserted that the union had interfered with his right to contract and pursue a lawful occupation and breached a promise implicit in the membership agreement not to discriminate unfairly and not to deny any member the right to work. Wrongful expulsion from membership was not involved.

Rather his action was in the nature of an unfair labor practice. This court distinguished **Gonzales**, supra, by pointing out that the lawsuit focused principally, if not entirely, on the union's activities with respect to Borden's efforts to obtain employment and not with his membership rights in the union.

Perko, supra, was similar to **Borden** in that a union member sought damages because the union had interfered with his employment by causing his discharge as a foreman and by preventing him from obtaining employment in such a capacity. It did not involve membership rights in the union, but focused entirely on the employment relationship.

The St. Louis Court of Appeals in addition to relying on **Gonzales**, supra, placed emphasis on **Sipes v. Vaca**, 397 S. W. 2d 658 (1966), as supporting the conclusion that preemption was not applicable (Appendix A, page 22, of the Petition). In its opinion the court pointed out that this court had granted certiorari in **Sipes**, supra.

Petitioners ignore the existence of **Sipes**, in their argument for a writ of certiorari, although that case was decided by this court on February 27, 1967, **Vaca v. Sipes**, 386 U. S. 171 (1967). In that case plaintiff sued for breach of the duty of fair representation and defendants claimed that the doctrine of preemption was applicable. In holding that preemption did not apply this court, relying in part on **Gonzales**, supra, held that preemption did not apply where the activity regulated was a merely peripheral concern of the Labor Management Relations Act or touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, it would not infer that congress had deprived the states of the power to act.

Allis-Chalmers, supra, makes it crystal clear that internal union affairs are not the basis of an unfair labor

practice to give the National Labor Relations Board jurisdiction. Since the Board has no jurisdiction over such affairs the doctrine of preemption cannot come into play.

In addition to the foregoing **Gonzales** pointed out that the National Labor Relations Board could not provide an adequate remedy in a case of this sort because it could not "**mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not in such a case as is here presented, deprive a party of available state remedies for all damages suffered.**" (Emphasis added.)

Respondent's expulsion lasted two years and four months. During that time he pursued his internal union remedies. He suffered from an inability to find work, mental pain and anguish, and from loss of friendly relationships with his fellow union "brothers". To a man like respondent, this was a severe loss because he had actively participated in union activities, attended almost every union meeting, and had been a shop steward. He was entitled to recover for these items of damage and the Board could not give him this relief. The jury's award covered much more than lost wages. The jury may have been more concerned with mental pain and suffering and loss of union membership. Before his expulsion, respondent earned approximately $4,000 a year as a truck driver (180). His total lost wages because of inability to find work were $9,300.00. However, he had earnings to be taken into consideration of $1,147.32 in 1956, $92.86 in 1957, and $3,188.57 from the tavern which he operated. If these earnings are deducted from the annual, respondent's lost earnings are less than one-half of his verdict. This clearly demonstrates that many other items of damage were included in the verdict.

If preemption applies because restoration of union membership is not involved, the union could always

defeat an action of this type by restoring the expelled individual to membership just before his case is heard. Certainly, this court cannot permit any such thing to happen.

Bussey v. Plumbers, Local No. 3, 286 F. 2d 165 (C. A. 9, 1961), and **Burns v. United Brotherhood of Carpenters and Painters**, 204 F. S. 599 (U. S. D. C. Del. 1963), which were decided after **Gonzales**, supra, hold that preemption did not apply even though restoration to union membership is not involved.

II.

CONCLUSIONS.

In view of the foregoing, the Petition for a Writ of Certiorari should be denied.

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